

**Memorandum**

Date : August 30, 1994

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To : John P. Caffrey, Chairman  
State Water Resources Control Board  
901 P Street, Room 100  
Sacramento, California 95814

From : Department of Water Resources

Subject : SWRCB Planning for Flow and Diversion

At the Board's last public workshop on Bay-Delta standards, DWR was requested to provide the Board and its staff an analysis of the Board's authority to promulgate a plan setting forth flow and diversion objectives for the estuary. Please find enclosed ten copies of that analysis. DWR will provide copies for the workshop participants at the workshop on September 1, 1994.

As you will see, we believe that the Board has sufficient authority to adopt such a plan. Moreover, we believe that the Board may fully integrate the planning objectives for flow and diversion and for water quality into a single planning document. Lastly, we believe that the CEQA requirements for the development of flow and diversion objectives (under a statutory exemption) can be fully met by utilizing the same environmental review methodology as the Board will use for water quality objectives under its Certified Regulatory Program. In short, there should be no procedural prejudice to the Board's development or adoption of the proposed plan for flow and diversion.

David B. Anderson  
Staff Counsel

Enclosures

## State Water Resources Control Board

### Authority to Promulgate Plan for Flow and Diversion<sup>1/</sup>

#### Introduction

The Department of Water Resources has proposed that the State Water Resources Control Board develop and promulgate a plan for flow and diversion for the Bay-Delta estuary at the same time that the Board considers the development and promulgation of a new water quality control plan pursuant to its triennial review of the water quality plan it adopted in May 1991. DWR has put forth this proposal because of its concern that flow and diversion issues need to be properly considered in a "pre- water rights" planning/policy phase, just as salinity, dissolved oxygen, and temperature are to be in the water quality plan. DWR is also concerned about how this should be done. In particular, it is DWR's view that flow and diversion are not in themselves water quality factors and should not be included as objectives in a water quality control plan.

In its first draft water quality control plan for the Bay-Delta hearings, issued on October 3, 1988, the Board included objectives for flow and diversion as if they were water quality parameters. The Board shortly thereafter revised its Bay-Delta hearing workplan and removed flow and diversion as water quality parameters from its water quality planning process. From that time, DWR and many others have clearly and repeatedly stated their view that flow and diversion are not water quality parameters, nor are those flow and diversion impacts which are unrelated to water quality factors such as salinity regulable under the Porter-Cologne Water Quality Control Act (nor, much less, under the federal Clean Water Act). In response to ambiguity in the Board notices for the current workshops, DWR has twice and at length urged the Board to clarify its intention, one, to include flow and diversion in its current planning and policy development efforts, and two, not to include them as water quality factors in any new water quality control plan, but to deal with them as non- water quality factors which also affect beneficial uses.

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1. David B. Anderson, Department of Water Resources, August 29, 1994

Whether for the purpose of interpreting the definition of water quality in Porter-Cologne<sup>2/</sup> or for understanding the application and ambit of the Act in general, DWR has emphasized the importance of clearly distinguishing between impacts on beneficial uses caused by the constituent elements or characteristics of the water in a watercourse (water quality) from those caused by the characteristics or behavior of the watercourse itself.<sup>3/</sup> It is not our intention to set forth here the full legal argument why flow and diversion (as well as velocity, depth, stage, Q, direction, volume, impoundment, etc.) are not water quality parameters under state water quality laws. But we do offer a brief comment. DWR recognizes that the Legislature may impart any meaning to a word or phrase it desires for purpose of the legislation it may be enacting. The cardinal rule of statutory interpretation, however, is that words in statutes are intended to have their ordinary meaning unless it can be shown that the legislature intended that they have some other, special meaning. There is nothing that we know of, either in Porter-Cologne, in its legislative history, or in the common law and statutory antecedents of Porter-Cologne that indicates that flow, diversion, etc. were intended to be included in the Act's definition of water quality. Quite to the contrary, the manifest concern of water quality law in this State has been the control of waste, pollution, contamination, toxics, and so forth: in other words, what is commonly and ordinarily understood by water quality.<sup>4/</sup>

The second fundamental tenet of statutory construction is that the interpretation of a statute must recognize and seek harmony with the larger statutory scheme of which it is a part. Defining "water quality" in the context of both Porter-Cologne's regulatory scheme as well as in the context of the other statutes and laws regulating water in this state (not only water allocation, but flood control, drainage, land reclamation, navigation, dam safety, etc.) seems rather plainly to compel a

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2. Water Code Section 13050(g) states: "'Quality of the water' or 'quality of the waters' refers to chemical, physical, bacteriological, radiological, and other properties and characteristics of water which affect its use."

3. Flow and diversion are those aspects of the characteristics or behavior of watercourses which, as opposed to flood control or navigation, for example, are under some statutory authority of the Board.

4. Water quality law has perhaps pushed somewhat the conventional usage in the area of temperature. But it has done this deliberately and expressly, and temperature still falls within the category of characteristics of the water within a watercourse.

meaning for "water quality" which does not include flow and diversion (or the other aspects of the characteristics or behavior of watercourses clearly addressed under other statutory schemes), but rather its ordinary or common sense meaning, viz., the constituent chemical, biological, or physical characteristics of the water found in the watercourse.

### Purpose and Structure of the Proposed Plan

In order to discuss the issue of Board authority to promulgate a plan for flow and diversion, it is important first to understand what is intended by such a plan, what its purpose would be, and what the plan would look like.

Together, the water quality control plan and the plan for flow and diversion would include planning and policy for all regulatory matters under Board jurisdiction that need to be addressed in the upcoming water rights hearing. With these two plans, the Board would have a complete set of planning and policy objectives, whose implementation would be the subject of that water rights proceeding.<sup>5/</sup>

As we noted in our presentation to the Board at its April, 1994 Bay-Delta Workshop, the plan for flow and diversion may take different forms depending upon the purposes it is intended to serve.<sup>6/</sup> The purpose of the plan for flow and diversion, like the Water Quality Control Plan, would be to determine policy principles and objectives of general application useful as a framework or benchmark for later specific actions and decision-making (here, actions in a water rights proceeding). For Statewide water use, these principles and objectives are provided

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5. These two plans would cover the areas of potential direct Board regulation. It has been recommended that the Board also address in a comprehensive planning mode all the factors that influence the Bay-Delta environment, including those beyond the Board's direct regulatory control. This plan would contain proposals and recommendations to agencies and entities, including perhaps the legislature, for protective action on a broad front. DWR strongly supports such a planning effort. This memo is specifically limited to discussing the propriety of a plan for flow and diversion, and nothing herein should be construed to suggest that the Board lacks any authority to develop that comprehensive plan.

6. The statutes which authorize the Board to develop such plans and policies are more general and do not, as for water quality control plans, prescribe a certain structure or format. The Board has broad discretion to frame a plan to suit its particular purposes.

by the California Water Plan. For basin-wide water quality purposes, they are provided by water quality control plans. For flow and diversion and their impacts on beneficial uses, there is no such express planning function. Given the substantial interest in the role of flow and diversion in the estuary, it would be most useful for the Board to develop a similar planning/policy framework to identify the objectives that provide reasonable protection to beneficial uses (focusing on instream beneficial uses) with respect to the overall impacts of flow and diversion and to identify the general benefits and costs of protection of the different categories of beneficial use.

DWR recommends that the structure of the proposed flow and diversion plan be similar to that of a water quality control plan, containing a set of objectives for flow and diversion designed to provide reasonable protection to all beneficial uses of the Bay-Delta estuary.<sup>2/</sup> A program of implementation for flow and diversion objectives might also be included to provide, as for water quality plans, not only guidance on how to achieve the planning goals but an express basis for assessing the costs (and hence the reasonableness) of the objectives set forth in the plan.

The plan's purpose and function would be similar to those of water quality control plans, specifically as such plans relate to or are used in water rights proceedings. A primary purpose of water quality plans, to facilitate the control of waste discharges, is not directly germane to the Board's water rights authority. The Water Code does, however, clearly define the role of water quality plans in water rights proceedings: they are to be "considered" by the Board in developing terms and conditions in permits and in determining the "public interest" (Water Code Sections 1257 and 1258). They are not binding in and of themselves; nor do they compel any particular evidentiary conclusion or finding in a water rights hearing. Presumably, they constitute "some evidence" of the points or policies they contain. As contrasted with their binding effect on the development of future waste discharge requirements (Water Code Section 13263(a)), for example, they have no general, mandatory

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7. "Reasonable protection to beneficial uses" (or to particular beneficial uses) of course means reasonable protection with respect to the impacts of flow and diversion, just as, in the context of water quality objectives, it means with respect to the impacts of water quality parameters. Often, it seems, the failure to recognize that the shorthand phrase implicitly includes the underscored limitation leads to the awkward and erroneous conclusion that a particular protective statute must provide all the protection requirements for a beneficial use, not just those requirements sensibly intended to be covered by the statute.

connection with any particular water rights proceeding. It may be that a given water quality plan identifies water rights regulation as an element in the Program of Implementation (but then, it may not); and the Board may, in its discretion, choose to proceed with such regulation. (See Water Code Section 1258.) Even then, the Board may discover, upon an examination of the particular facts and circumstances of a particular water user in an adjudicatory hearing, that it is not reasonable or otherwise warranted to impose terms or conditions upon that user that in any way implement the water quality control plan.

Although it is not necessary to the discussion of the central issue of the Board's authority, we propose what we believe to be a further refinement as to how the Board should physically develop and present the plan. Once it is clear that the Board is involved in a planning undertaking whose purpose is to set forth the overall objectives for flow and diversion and for water quality for the estuary, there is no reason why these efforts may not be merged and why these objectives may not be combined into one document. In fact, there is much to recommend it. Although flow and diversion are not aspects of water quality, they do, in the Bay-Delta estuary, closely relate to and interact with water quality factors in their affects on beneficial uses and in regulatory and management strategies to control them. The clearest and most straightforward way to consider the two sets of factors is to deal with them at the same time, rather than serially or disjunctively. Since the Board's approach to both sets of objectives will be the same, there is no reason why they may not be treated in a single, unified, planning document.<sup>8/</sup> All the Board need do is clearly identify those objectives that are for water quality and those that are for flow and diversion. Although DWR recommends this combined approach, for convenience we will still refer in this discussion to the flow and diversion objectives as though they constituted a separate plan.

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8. This should be contrasted with the problem with the Board's 1978 Water Quality Control Plan discussed in United States v. State Water Resources Control Board 182 Cal. App.3d 82 (1986), the so-called "Racanelli Decision". There, the Board intermixed the substantive requirements for water quality planning with the requirements for determining the obligations of two specific water rights holders. Here, the Board's purposes--"global" planning for the control of specific factors affecting beneficial uses of the waters of the estuary--are substantially the same for water quality as they are for flow and diversion. Where they may be different, the Board need only be careful to address the differences.

## Proposal

Proposal: The Board should develop and adopt a plan for the Bay-Delta estuary to assess the overall impacts of flow and diversion factors on beneficial uses, to determine objectives for flow and diversion that would provide reasonable protection to all beneficial uses of the waters of the estuary, and to propose a general program of implementation.

### Questions:

1. Does the Board have authority to develop and adopt the proposed plan and to use it for its intended purposes?
2. May the Board develop the plan outside and prior to the water rights hearing in which it is intended to be considered?
3. Does the preparation or adoption of the plan require the preparation of an EIR?

### Discussion:

The central question is whether the Board may develop and adopt a plan containing objectives for flow and diversion for the Bay-Delta estuary to provide reasonable protection to beneficial uses, which will be relevant to and useful in a particular water rights proceeding. This question goes to the fundamental authority of the Board, itself, to develop and consider aggregate policy and planning perspectives in acting on specific water rights matters. A related question is whether the Board may do this as a purely planning effort accomplished outside of and prior to the water rights proceeding to which the plan will be relevant.<sup>2/</sup> We assume that, in default of this anticipatory planning effort, the Board will still need to develop the same information during the water rights proceeding--but under rules of procedure applicable to quasi-judicial decision-making. The very reason for the prior planning effort is, therefore, both the usefulness of the plan to the subsequent water rights proceeding and the observance of procedural rules appropriate to the synthesis of policy rather than to the implementation of policy against specific parties.

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9. This is not to say that the Board must have in mind one particular proceeding or a well-defined set of water right holders who are to be subject to some proceeding. Although we believe the Board's authority to be broad in this area, this breadth of authority is not in issue here. Here, the question is whether the Board may identify or develop planning objectives in anticipation of a water rights proceeding to which those objectives will unquestionably be relevant.

1. The Board has planning authority incident to its water rights administration and reasonable use authorities to develop and adopt the proposed plan.

There is implied in a legislative directive, mandate, or grant of authority to an administrative agency the power to do the things which are necessary and proper to carry out that which the legislature has expressly directed, mandated, or authorized. In the case of the Board's administration of water rights, the legislature has expressly granted a broad general authority to the Board to proceed in any manner useful to that administration. Several sections of the Water Code contain or reflect this general authority:

Water Code Section 183 states that the Board "may hold any hearings and conduct any investigations in any part of the state necessary to carry out the powers vested in it..."

Water Code Section 275 directs (and empowers) the Board to take "all appropriate proceedings...to prevent waste, unreasonable use, unreasonable method of use, or unreasonable method of diversion of water in this state."

Water Code Section 1250 directs that, in acting upon applications for permits to appropriate water, the Board "shall do all things required or proper relating to such applications."

Water Code Section 1251 directs the Board to make "such investigations of the water resources of the State as may be necessary for the purpose of securing information needed in connection with applications for appropriation of water."

Water Code Sections 185 and 1058 authorize the Board to adopt rules and regulations as it deems advisable in carrying out its powers and duties.

These statutes confer upon the Board a broad authority to proceed in the administration of statutory water rights (as well as to secure the reasonable use of water) in a manner that the Board finds useful or convenient to the accomplishment of its statutory purposes. In addition, several sections of the Water Code require the Board to consider matters which are not specific to a particular water rights application and which are therefore amenable to being developed as general points outside the context of the particular water rights proceeding:

Water Code Sections 1243, 1243.5, 1253, 1255, and 1257 all require the Board to act in, and hence to determine, the "public interest" at various points in the consideration of water rights and water right terms and conditions. Public policy and relevant

general features or patterns of water use are integral aspects of the public interest. These aspects are amenable and in fact commend themselves to being identified or developed as rules of general application.

Water Code Section 1243 directs the Board to take into account recreational and fish and wildlife requirements, which requirements may be identified apart from the specifics of a particular water rights application.

Water Code Section 1243.5 similarly directs the Board to consider the water needed by beneficial uses, which needs similarly may be ascertained independent of a given application.

Fundamental to all the Board's water rights determinations is its charge to secure the reasonable use of water. In addition to consideration of the facts and circumstances of the particular parties to a water rights proceeding, the determination of reasonable use also includes "statewide considerations of "transcendent importance"<sup>10/</sup>, i.e., policies and principles of general applicability. Thus, implicit in the Board's determinations of reasonable use is the reference to or consideration of plans and policies which may be relevant to a particular proceeding but which may be identified or developed independent of that proceeding.

These two sets of statutes, one, expressly give the Board broad authority to adapt its processes as may be useful, necessary, or convenient in order to carry out its water rights responsibilities, and, two, implicitly authorize the Board to make and apply determinations of general applicability for the same purposes. The use of quasi-legislative processes<sup>11/</sup> to plan for or to determine principles of general application relevant to water rights decision-making would seem to be an appropriate and modest exercise of the Board's broad and unequivocal grant of procedural authority.

2. The Board may develop this plan outside of the water rights proceeding in which it is to be considered.

It should be readily apparent that the Board has the authority to consider in a water rights proceeding plans and policies developed outside of that proceeding. Put somewhat

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10. Joslin v. Marin Municipal Utility District, 67 Cal. 2d 132 (1967)

11. As noted above, the Board's general authority to adopt regulations in the nature of rules of general application is set forth in Water Code Sections 185 and 1058. It is further described in 23 Calif. Code of Regulations Sections 649 et seq.

differently, there is no general legal principle or statutory requirement to the effect that broad plans and policies that may legally and properly be considered by the Board in a water rights proceeding must be developed only in the course or context of that proceeding.

To begin with, this observation comports with a practical and common sense approach to an agency's accomplishment of interrelated legislative and adjudicatory functions. Planning and policy-making are, administratively, quasi-legislative functions. Water rights actions, on the other hand, are quasi-judicial functions. The adjudicatory forum is at best an unartful vehicle for broad policy-making or for developing rules of general application. It makes sense that such policies and general rules, however applicable they may be to a later water rights proceeding, not only can but whenever practical should be developed outside the adjudicatory process. Furthermore, were general plans and policies that are to be considered in a water rights proceeding required to be developed in that proceeding, they would have to constantly be re-invented in each subsequent proceeding.

In fact, the Water Code does clearly authorize the Board to consider plans and policies prepared outside the water rights forum in acting on water rights applications:

Water Code Section 1256 requires the Board to consider the California Water Plan or any other "general or co-ordinated plan looking toward the control, protection, development, utilization, and conservation of the water resources of the State". [N.B.: This section by itself would authorize the consideration of a plan for flow and diversion in a water rights proceeding.]

Water Code Section 1257.5 requires the Board to consider streamflow requirements proposed for fish and wildlife pursuant to Public Resources Code Sections 10001 and 10002.

Water Code Section 1258 requires the Board to consider water quality control plans (and Section 1257 requires consideration of the relative benefit of uses specified in relevant water quality control plans).

A possible concern that may arise is that Board planning for flow and diversion may somehow prejudice the later water rights proceeding, either in respect of the due process rights of the parties to that proceeding or in derogation of some other responsibility of the Board in the conduct of that proceeding. While it is true the Board must consider the general pattern of uses that will emerge from the plan in determining whether the objectives for flow and diversion are reasonable, this is no different from what it does in a water quality control plan. Nor is the subject matter inherently more prejudicial. Regulation of

the impacts of flow and diversion and regulation of the impacts of water quality both may imply substantial burdens on water users. The most important point is that the objectives adopted for flow and diversion, like the objectives for water quality, have no binding effect in the subsequent water rights hearing. While both plans may constitute some evidence of the points they contain and may support a finding, they do not preclude the introduction of evidence to support contrary findings.

In 1980, the Board proposed a rule-making to establish instream flow requirements for the rivers of the State. In 63 Ops. A.G. 95 (Feb. 8, 1980), the Attorney General issued an opinion that the proposed regulations violated the provisions of the Water Code that require the Board to balance competing beneficial uses in a water rights proceeding. While many of the determinations of water use requirements in that prior rule-making effort are similar to those envisioned for a plan for flow and diversion, there is a crucial difference. Under the Board's 1980 proposed rule, not only would the quasi-legislative requirements have constituted "some evidence" of the applicable instream needs in later water rights proceedings, but they would have created a presumption in such proceedings of "the amounts of water reasonably required" to meet instream needs. The Attorney General characterized this as a presumption affecting the burden of proof. It was the creation of this presumption in later water rights proceedings that led the Attorney General to express disapproval of the Board's proposed rule-making. In contrast, the objectives in the plan for flow and diversion would have no such presumptive or binding effect in the subsequent water rights hearing.

3. An EIR is not required for the preparation and adoption of the proposed plan.

While planning activities by public agencies in general may or may not be of a nature as to require the preparation of an EIR or Negative Declaration, it is clear that planning by State agencies is statutorily exempt from the requirements of CEQA. The statutory exemption is contained in Public Resources Code Section 21102, which relates to the funding of planning and feasibility studies by State agencies for possible future actions. Section 15262 of the CEQA Guidelines clarifies that Section 21102 exempts state planning and feasibility studies from any requirement to prepare an EIR or Negative Declaration, if the studies include consideration of environmental factors and assuming the studies will not have a legally binding effect on later activities (in this case, the later water rights decision). The applicability of statutory exemptions under CEQA, unlike categorical exemptions, does not depend on the project in fact having no significant impact on the environment.

As discussed above, the plan for flow and diversion will have no binding effect on the later water rights decision. Although the Board should declare its intention to use the plan in the later proceeding--which is, after all, its reason for doing it in the first place--neither the plan nor the objectives in it bind the Board to a particular decision or outcome in the water rights proceeding. The plan will merely constitute some evidence (and hopefully sound evidence) of what the reasonable objectives and policy for the estuary should be in respect of flow and diversion factors. The Board's actual decision will be based on all the evidence in the record of the hearing.

Since the effects of flow and diversion on the Delta's biological resources will be a direct focus of the plan, and since both public trust doctrine and constitutional reasonableness require consideration of the impact of water use on environmental values, the second condition on the use of the statutory exemption is also met, viz., the consideration of environmental factors.<sup>12/</sup> In fact, a point DWR has made previously is that, especially in matters such as the Bay-Delta hearings, the scope of consideration of environmental values under the principle of reasonable use and the Board's public interest jurisdiction is generally broader than that under CEQA. Environmental impacts are integral aspects in the determination of reasonable use, and the Board's reasonable use and public interest considerations include enhancement as well as mitigation. It would be hard to imagine impacts or alternatives that the Board might consider under a CEQA review that would not be at least as fully explored under Board planning and the setting of objectives for water quality and flow and diversion.

Referring again to DWR's suggestion above that the consideration of flow and diversion and water quality objectives be accomplished under the cover of a single combined planning document, it occurs to us that the consideration of environmental factors required under the statutory exemption could utilize the same methodology as is used for the certified regulatory program applicable to the water quality planning process. In this way, the Board would have a completely homogeneous analytic process applicable to both water quality and flow and diversion parameters, under both the Water Code and the Public Resources Code. In other words, the Board's process for consideration of flow and diversion objectives could be tailored to be exactly the

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12. In any case, the Board simply needs to make sure it "considers environmental factors" within the meaning of the exemption.

same as if flow and diversion were (erroneously) included as water quality factors in a Water Quality Control Plan.<sup>13/</sup>

### Conclusion

The Board has been given authority to adopt rules of general application useful to the exercise of its water rights administration responsibilities. The consideration of general plans and policies in water rights proceedings which have been developed outside those proceedings is a clear power and frequent responsibility of the Board. The Board itself is required to consider general needs and policies with respect to the beneficial and reasonable use of water as part of its water rights proceedings and decision-making. The Water Code both implicitly and explicitly confers on the Board the authority to make its own identification and synthesis of policy and information with respect to reasonable and beneficial needs and uses of water. The exercise of this authority in anticipation of a later water rights hearing cannot be objectionable if the planning activity does not have a binding effect in that later hearing; it can cause no prejudice to any party to that hearing and cannot alter the Board's responsibility to balance and to render a decision based solely on the record of that hearing. Finally, this type of planning effort is statutorily exempt from CEQA.

When the Board establishes public interest terms and conditions for water rights, it has authority to protect beneficial uses not only from the ill or unreasonable effects of poor water quality, but also from all of the other incidents of water use that may adversely affect given beneficial uses. We know that flow and diversion can be among those other incidents of water use. This does not make flow and diversion aspects of water quality. There are distinct and independent statutory schemes governing the many aspects of water resource management in California. The fact that they may interact or jurisdictionally overlap at times does not mean they are the same thing. Their interaction is governed by rules of statutory interpretation, which can sensibly do nothing but support their fundamental separateness. The failure to recognize their separateness can only lead to great confusion and the assertion of power and control over water in ways never intended by the state and nation's legislative policy-makers.

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13. Substantive differences in the consideration of the different sets of objectives could still obtain, however. One example is the possible applicability of anti-degradation requirements to water quality standards, which would not be applicable to non-water quality standards such as flow and diversion.